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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 732

JAMES BRYSON MARTIN,
Petitioner

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals for
The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The Petition herein seeks to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on June 18, 1968, and reported at 397 F.2d 741. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of Texas denying Petitioner's Application for Writ of Habeas Corpus, the opinion of the District Court being reported in 260 F.Supp. 589 (1966).

The habeas corpus Petition in federal district court had followed a state appeal to the Texas Court of Criminal Appeals which affirmed Petitioner's state conviction by the Opinion reported in 395 S.W.2d 631.

Review by certiorari was denied by this Court on November 22, 1965, at 382 U.S. 928. Thereafter, as noted above, the federal district proceedings were instituted, relief was denied, the Court of Appeals affirmed, and Petitioner is back before this Court.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition for Writ of Certiorari, although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner sets out six questions which he asserts are raised by the facts and circumtances of this case. Respondent does not feel that the "Questions" as stated are accurate characterizations of the real issues. Rather, Respondent says that the true questions presented may be capsulated as follows:

1. Is there a constitutional bar to obtaining business corporation records by subpoena, when these records may serve to incriminate an officer of the corporation, but where such records were not, in fact, used in any way to obtain a conviction of the corporate officer?

2. Is an impartial grand jury a constitutional requisite and is this question actually presented by the facts and circumstances of this case, when the grand jury in question indicted Petitioner long after publicity generated by a Court of Inquiry had subsided?

3. Did Petitioner get a fair and impartial trial, and is it constitutionally permissible to change venue to a

locality which is untainted by publicity that was given the case at the situs of the crime charged?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are listed at page 6 of the Petition and reproduced in Appendix "B" to the Petition.

STATEMENT OF THE CASE

Petitioner was indicted along with four others for unlawfully bribing Clem McClelland, the Probate Judge of Harris County, Texas. A motion for severance was granted and Petitioner was tried individually.

The evidence adduced at the state trial disclosed that it was the duty of the State Judge to appoint administrators, guardians and appraisers for cases filed in the probate court. It was shown at Petitioner's state trial that the Probate Judge favored the Petitioner and his four defendants very strongly in making appointments as appraisers in estates. Moreover, they collected not only the statutory fee of Five Dollars ($5.00) as appraisers but collected additional appraisal fees which were approved by the Probate Judge.

It was further shown that the Petitioner was an incorporator of a corporation known as the Tierra Grande Incorporated. Petitioner, as president of the corporation, opened a bank account in the Citizens State Bank of Houston in the name of Tierra Grande, Inc. The only persons authorized to make withdrawals from the account were Petitioner and Judge McClelland's secretary. While Petitioner and his four co-indictees were acting as appraisers under appointment

by the court, each and all of them made many deposits into the Tierra Grande bank account. During the same period, numerous checks were drawn on the bank account either payable to Judge McClelland or which were shown to be for his benefit.

Investigation into the alleged irregularities in the probate court were begun by a Harris County grand jury which was convened in May of 1962. In June of 1962, the District Attorney asked for the formation of a Court of Inquiry under Articles 886 and 887 of the Texas Code of Criminal Procedure, 1925. Pursuant to the request, Justice of the Peace Ragan of Harris County ordered the convening of a Court of Inquiry. The hearing began on June 14, 1962. Observation is made that the aforementioned articles have been repealed and that a Court of Inquiry can no longer be instituted by a justice of the peace, but must now be constituted under the authority of a state district judge.

However, prior to the swearing in of the May grand jury and prior to the convening of the Court of Inquiry, information concerning irregularities in the operation of the Probate Court had come to the District Attorney's attention. The District Attorney's office also had knowledge of the Tierra Grande Corporation and said Tierra Grande bank account prior to the beginning of the Court of Inquiry.

The Court of Inquiry, as noted above, began on June 14, 1962. Petitioner was subpoenaed to appear before the Court of Inquiry and was directed to produce the records of Tierra Grande, Inc., as the corporation's agent and president. Petitioner consulted with counsel before producing the records and was

permitted to have counsel present during his appearance before the Court. Although Petitioner and other witnesses were compelled to take the stand, they were permitted to exercise the Fifth Amendment privilege against compulsory self-incrimination.

The Court of Inquiry ended on June 18, 1962. The May grand jury, which had begun investigation into the Probate Court irregularities, would, by normal operation of law, have expired three months after its formation or at the end of July, 1962. Its term was, however, extended for three additional months so that it could continue the investigation already begun. It was finally discharged at the end of October, 1962, without returning any indictment against the Petitioner. Nor did the November 1, 1962, grand jury, which was discharged at the end of January, 1963, return an indictment. It was not until April 29, 1963 that an indictment was returned against the Petitioner and the four others, charging bribery of the probate judge, by a grand jury sworn in on February 1, 1963.

On November 15, 1963, the Criminal District Court of Harris County, ordered a change of venue to Brazos County. Petitioner was tried in January of 1964 and the jury returned a verdict of guilty and assessed a sentence of four years imprisonment in the penitentiary. Petitioner began serving his sentence in December, 1965 and was paroled on October 10, 1966. He will have served his sentence completely by March 10, 1969.

ARGUMENT AND AUTHORITIES— REASONS FOR DENYING THE WRIT

The Court Of Inquiry Proceedings Are, In Actuality, Immaterial To A Decision By This Court.

For all the hue and cry in this case concerning the holding of the Court of Inquiry, an analysis of all the facts and circumstances will show that this hearing did not affect any right guaranteed to the Petitioner under the Constitution of the United States.

No evidence that was adduced or discovered at the Court of Inquiry was later used in Petitioner's state trial. Indeed, the only evidence at all in question were the records of the Tierra Grande corporation, and it is true that some of these records were subpoenaed before the Court of Inquiry. However, these records were not used by the prosecution at Petitioner's trial for bribery, partially because the prosecution considered that the records may have been falsified. Nor did the subpoenaed Tierra Grande records furnish any leads that led to discovery of evidence that was used at the trial. The only evidence used that was connected with Tierra Grande was the corporation bank account. This account was known to the state prior to the Court of Inquiry and the bank records used in the state trial were those of the bank, not the Petitioners' records or the records of the Tierra Grande Corporation.

Furthermore, the holding of the Court of Inquiry did not affect the impartiality of the grand jury which later indicted Petitioner. Certainly no showing of this was made below, as required by this Court in *Beck v. Washington,* 369 U.S. 541 (1962). Furthermore, it may make no difference whether the grand jury returning the indictment against the Petitioner was impartial or not.

This Court has consistenly held that there is no constitutional bar preventing a state from dispensing with grand juries in state prosecutions. *Hurtado v. Califor-*

nia, 110 U.S. 516, 538 (1884); *Kennedy v. Walker,* 337 U.S. 901 (1949); *Beck v. Washington,* supra, at pages 549 and 579; *Malloy v. Hogan,* 378 U.S. 1, 4, n. 2 (1964). And as was said in *Beck:*

> "... It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. Compare Lawn v. United States, 355 U.S. 339, 349-350 (1958); Costello v. United States, 350 U.S. 359, 363 (1956); Hoffman v. United States, 341 U.S. 479, 485 (1951). *But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view*—we have concluded that Washington, so far as is shown by the record, did so in this case." (Emphasis added.)

It is submitted that when the question of the necessity of grand jury impartiality is squarely presented, the only workable and logical rule that can be promulgated will be one that does not require an unbiased or impartial grand jury. Otherwise, the cases holding that there is no constitutional requirement for a state to use a grand jury may fall, since it can always be charged that a prosecutor bringing a criminal action by information, under a duty to prosecute vigorously, is both biased and prejudiced in favor of the state.

A decision which will not impose an impartiality requirement on the grand jury would be completely and logically sound. All evidence that is submitted to the grand jury which results in the return of an indictment is, in effect, prejudicial evidence. In other words, if the evidence does not prejudice the grand

jury against a person being investigated, no indictment will be returned. It is therefore reiterated that there should be no requirement for an impartial grand jury.

Nevertheless, no necessity exists here to determine whether a grand jury need be impartial. As previously noted, no showing was made that the grand jury was, in fact, not impartial. And more important, as pointed out above in the "Statement of the Case," the grand jury which indicted Petitioner was not the grand jury which was in session during the Court of Inquiry proceeding, and the indictment was not returned until April 29, 1963, some ten (10) months after the conclusion of the Court of Inquiry.

Lastly, the Court of Inquiry proceedings did not deprive Petitioner of a fair trial because of the generation of unfair and unconstitutional pretrial publicity. Petitioner's case was removed from Harris County, where the criminal acts took place and where the Court of Inquiry was held, to Bryan, the county seat of Brazos County, for trial. Bryan is located some 100 miles from Houston and the trial took place in January, 1964, some eighteen or nineteen months after the June, 1962 Court of Inquiry. Surely any inflammatory prejudice resulting from the Court of Inquiry proceedings had long since dissipated. Moreover, no showing was made or attempted below that the Brazos County trial jury was anything other than impartial, and indeed, no such showing could have been made. Cases such as *Estes v. Texas,* 381 U.S. 532 (1965), which presume harm, are inapplicable to the facts of this case where the trial was held eighteen or nineteen months after possible prejudicial publicity, at a point far removed from the asserted publicity.

Respondent reiterates that when stripped of all the embroidery and embellishment begot, nurtured and developed by skillful counsel, the Court of Inquiry proceedings must disappear from this case as any foundation or cornerstone upon which a claim for relief before this Court can be predicated. The procedure, as set up by the Texas statutes in force at the time of this case, may prescribe procedures that are undesirable and even, arguendo, unconstitutional in some circumstances, but this will not entitle Petitioner to relief. The Court of Inquiry procedure must be correlated to some right guaranteed him by the Constitution and no such relationship exists here. Furthermore, the motives of the District Attorney in holding the Court of Inquiry are not material. Only pertinent, is, again, whether the Court of Inquiry proceedings, whether good, bad or indifferent, constitutional or unconstitutional, ultimately caused Petitioner to be unfairly convicted of the offense of bribery in the District Court of Brazos County, Texas. Respondent submits that the conviction was unaffected by the Court of Inquiry and should stand.

1. *The Subpoena Of The Tierra Grande Corporation Records By The Court Of Inquiry Was Constitutionally Permissible And Deprived Petitioner Of No Right Guaranteed By The Constitution.*

As observed above, the Court of Inquiry directed a subpoena duces tecum to Petitioner, as president and agent of Tierra Grande, Inc., directing him to bring the records of the corporation before the Court of Inquiry. This was done and some testimony concerning the records was elicited.

It should first be noted that the general rule is that

corporation records, such as those of Tierra Grande, are not covered by the Fifth Amendment privilege against self-incrimination. *Hale v. Henkel,* 201 U.S. 43 (1905); *United States v. White,* 332 U.S. 694 (1944). See also *McPhaul v. United States,* 364 U.S. 372 (1960). However, it is not necessary to apply the general rule here.

The Tierra Grande records were not used at Petitioner's later bribery trial, and no leads to other evidence were obtained as a result of the Court of Inquiry. The only evidence submitted at Petitioner's later trial that concerned Tierra Grande was the bank account of the corporation which was obtained from the bank itself. This bank account was known to the District Attorney's office prior to the Court of Inquiry hearing. Accordingly, there was nothing incriminatory for the Fifth Amendment to apply to and nothing discovered or seized so as to invoke the provisions of the Fourth Amendment.

2. *While Indictment By A Fair And Impartial Grand Jury Is Not Thus Far Constitutionally Required, The Grand Jury Which Indicted Petitioner Was, In Fact, Fair And Impartial*

That there is no infirmity in the grand jury which indicted Petitioner, has been discussed at length above in the discussion of the impact and effect that the Court of Inquiry had on the grand jury.

To recapitulate, there is presently no constitutional rule requiring states to have grand juries. And, even when a grand jury is provided, there is, as yet, no decision by this Court requiring that the body be impartial.

But in any event, the grand jury that indicted Petitioner cannot be said to have been partial or biased. While Petitioner charges that two grand jurors attended the Court of Inquiry, these were not members of the grand jury which indicted Petitioner. The indictment was returned by another grand jury on April 29, 1963, ten months after the Court of Inquiry ended and after the publicity spawned by the investigation had dissipated.

Lastly, Petitioner failed utterly in showing any bias or prejudice as is required by *Beck v. Washington,* supra. The attack on the grand jury is without merit.

3. *Petitioner Received A Fair And Impartial Trial In Brazos County And Petitioner Has No Constitutional Right To Be Tried In The County Where His Crime Is Committed.*

Heretofore, it has been shown that Petitioner's alleged bribery of the probate judge became known to the district attorney in the spring of 1962. A grand jury, convened in May of 1962, began to investigate the probate court, and, in June of 1962, a Court of Inquiry was held to inquire into the activities of the probate court. The Court of Inquiry produced much newspaper, radio and television publicity.

Later, in April of 1963, Petitioner was indicted for bribery. On November 15, 1963, the Harris County District Court ordered a change of venue on its own motion to Brazos County. Petitioner complains that he has the right to be tried at the situs of the crime and that this right was denied to him.

The common law rule was that an accused had the right to be tried in the county or district where the

crime was committed. *United States v. Nailon,* 211 F. Supp. 677 (E.D. Pa. 1962). The federal rule is to the same effect. *United States v. Johnson,* 323 U.S. 273 (1944); *United States v. Cores,* 356 U.S. 405 (1958). This rule has not, thus far, been held applicable to the states. However, even if the trial situs rule of *United States v. Johnson,* should be applied to states, the change of venue action here was proper. For the *Johnson* rule has been tempered and modified by this Court in rulings which *require* a change of venue to insure a *fair trial.* See *Sheppard v. Maxwell,* 384 U.S. 333, wherein it was said at page 363:

> ". . . But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or *transfer it to another county not so permeated with publicity. . . .*" (Emphasis supplied.)

No constitutional imperfection is present by the change of venue to Brazos County.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwierner, Assistant Attorney General of Texas, certify that a copy of the foregoing Respondent's Brief in Opposition was served on the attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Clyde W. Woody, 918 Houston First Savings Building, Houston, Texas 77002, on this the __ day of February, 1969.

LONNY F. ZWIENER
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